No. 13305

United States Court of Appeals for the Ninth Circuit.

MEAD GILMAN, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA and ALBERT CHARLES DARNELL,

Appellees.

Transcript of Record

Appeal from the United States District Court, Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

PARKER, STANBURY, REESE & McGEE,
Suite 1217 Foreman Bldg.,
707 S. Hill St.,
Los Angeles 14, Calif.

For Appellee, United States of America:

WALTER S. BINNS,
United States Attorney:

CLYDE C. DOWNING,
REUBEN ROSENSWEIG,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

For Appellee, Albert Charles Darnell:

MORRIS LAVINE,
619-620 Bartlett Bldg.,
Los Angeles 14, Calif.

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United States District Court, Southern District of California, Central Division

No. 9703-B

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA, UNITED STATES COAST & GEODETIC SURVEY, and MEAD GILMAN, JR.,

Defendants.

COMPLAINT FOR PERSONAL INJURIES AND DAMAGES

Comes Now the plaintiff, and complains against the defendants, and for cause of action alleges:

I.

That jurisdiction herein is by virtue of the Federal Tort Claims Act passed August 2, 1946, 60 Stat. 843-847, 28 U.S.C.A., Secs. 921-946.

II.

That plaintiff is a resident of the City of Venice, County of Los Angeles, State of California, being in the jurisdiction of the above-entitled court.

III.

That the defendant United States Coast & Geodetic Survey is an agency of the United States of America.

That the defendant Mead Gilman, Jr., was at the

times mentioned herein an employee of the United States Coast & Geodetic Survey and resides out of the State of California. [2*]

That there is a diversity of citizenship between the plaintiff and the defendant Mead Gilman, Jr., and that the amount involved is more than $3,000.00, exclusive of interest and costs.

IV.

That on or about October 30, 1948, at or about the hour of 10:00 o'clock a.m. of said date, at Blythe, California, plaintiff was driving a certain automobile along the main highway and came to a complete stop behind two automobiles which had stopped to let a parked car emerge.

That at said time and place defendant United States of America and United States Coast and Geodetic Survey were the owners of a certain motor vehicle commonly known as a "jeep," bearing No. U. S. Government 1948—C 5683, which was then and there being driven by the defendant, Mead Gilman, Jr., who was then and there an employee of the United States of America and United States Coast & Geodetic Survey, and acting in the scope of his employment.

V.

That the said defendant, Mead Gilman, Jr., then and there, and while so acting within the scope of his employment as an employee of the other defendants, operated and drove said motor vehicle, said "jeep," in a careless, negligent and reckless

*Page numbering appearing at foot of page of original Certified Transcript of Record.

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manner, and that as a direct and proximate cause thereof drove said motor vehicle, said "jeep," into the automobile being driven by plaintiff, and which was at the time of said collision at a complete standstill.

VI.

That said collision was directly and proximately caused by the carelessness, negligence and recklessness of defendants, and as a direct and proximate result thereof plaintiff was thrown and hurled about and then and there became sick, sore, lame, bruised and disordered, and plaintiff was necessarily confined to his bed for a period of approximately five days, and thereafter was hospitalized for approximately twenty-three days, during which time he underwent a surgical [3] operation for a herniated disc, and incurred liability for doctor bills of approximately $1,000 for said surgery, and a further doctor bill of $50.00, and hospital bill of approximately $385.10, X-ray approximately $45.00, and ambulance service approximately $15.00.

That during all of said time plaintiff suffered severe and excruciating pain, nervousness and distress, and plaintiff is informed and believes, and upon such information and belief alleges the fact to be that his said injuries are permanent; that he will continue to suffer same for a long time to come and permanently, and that he will in the future require further medical care and attention.

VII.

That plaintiff is by occupation a carpenter and builder, and that since the said collision and said

injuries plaintiff has been unable, by reason of his said injuries, to gainfully carry on his occupation as a carpenter and builder, and has sustained loss of earning in the sum of approximately $3,000.00.

VIII.

That at the time of said collision and at the time plaintiff sustained said injuries, he was building a home for himself and that by reason of said collision and said injuries he was unable to complete the building of said home promptly and that as a result thereof, such structure was damaged by rain, broken windows and vandalism to the plaintiff's damage in the sum of approximately $700.00.

IX.

Plaintiff is informed and believes, and upon such information and belief alleges the fact to be, that he will be unable to work for a long time to come, and that he will continue to sustain loss of earnings.

X.

That plaintiff has sustained damages for doctor bills and medical care and attention in the sum of One Thousand and Fifty Dollars ($1,050.00); Hospital bill in the sum of Three Hundred Eighty-five and ten/one hundredths Dollars ($385.10); X-ray costs in the sum of Forty-five Dollars [4] ($45.00); Ambulance in the sum of Fifteen Dollars ($15.00); Loss of Earnings in the sum of Three Thousand Dollars ($3,000.00); damage to building in the sum of Seven Hundred Dollars ($700.00), and damage

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for injuries, pain and suffering in the sum of Twenty-five Thousand Dollars ($25,000.00).

Wherefore, plaintiff prays for judgment against the defendants as follows:

(1) $25,000.00 for injuries, pain and suffering;

(2) $1,050.00 for medical care and attention;

(3) For hospital care $385.10, X-rays $45.00, and ambulance $15.00.

(4) For such sum for future medical care and attention as to this Court shall seem just and proper;

(5) $3,000.00 for loss of earnings;

(6) For future loss of earnings in such sum as to this Court may seem just and proper;

(7) $700.00 for damage to building;

(8) That the Court, as a part of said judgment, determine a reasonable sum to plaintiff's attorney for attorney's fees; and

(9) For costs of suit herein and for such other and further relief as to this Court shall seem just and proper.

/s/ MORRIS LAVINE,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed May 18, 1949.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, United States of America, for itself alone, and in answer to the complaint on file herein, admits, denies, and alleges as follows:

I.

Defendant has no knowledge or information sufficient to form a belief as to the truth or falsity of the averment contained in Paragraph II of the complaint on file herein, and basing its denial upon said grounds, denies each and every allegation contained therein.

II.

Answering Paragraph III of plaintiff's complaint on file herein, defendant admits that the United States Coast and Geodetic Survey is an agency of the defendant, and that Mead Gilman, Jr., was at the time of the happening of the alleged accident herein an employee of said Coast and Geodetic Survey. This answering defendant has at this time no knowledge or information concerning the residence of said Mead Gilman, Jr. [7]

III.

Answering Paragraph IV of plaintiff's complaint on file herein, defendant admits that on or about October 30, 1948, it was the owner of a certain motor vehicle commonly known as a jeep bearing license No. U. S. Government 1948—C5683, which was being driven by Mead Gilman, Jr., an employee of the

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defendant, and at said time and place was acting within the scope of his employment.

IV.

Answering Paragraph V of plaintiff's complaint on file herein, defendant denies, both generally and specifically, that Mead Gilman, Jr., drove and operated the said motor vehicle in a careless, negligent and reckless manner, and that as a result thereof he drove said motor vehicle into the automobile being driven by plaintiff.

V.

Answering Paragraph VI of plaintiff's complaint on file herein, defendant denies, both generally and specifically, that said alleged collision was directly and proximately caused by the carelessness, negligence and recklessness of Mead Gilman, Jr. Defendant having no knowledge or information sufficient to form a belief as to the truth or falsity of the averments relating to the injuries allegedly suffered by plaintiff and the hospitalization and other medical expenses allegedly incurred by plaintiff, and basing its denial upon said grounds, denies each and every allegation contained therein.

VI.

Defendant having no information sufficient to form a belief as to the truth or falsity of the averments contained in Paragraphs VII, VIII, IX and X of plaintiff's complaint on file herein, and basing its denial upon said grounds, denies, both generally and specifically, each and every allegation contained therein.

For a Further, Separate, Second and Distinct Answer and Affirmative Defense This Answering Defendant Alleges as Follows:

I.

That the injuries to plaintiff, if any, and the result or [8] damage to plaintiff, if any, were caused without any fault, carelessness or negligence on the part of this answering defendant or any of its agents, servants and/or employees acting within the scope of their employment, but were the result of an unavoidable accident so far as this defendant is concerned.

For a Further, Separate, Third and Distinct Answer and Affirmative Defense, This Answering Defendant Alleges as Follows:

I.

That the injuries to plaintiff, if any, and the result or damage to plaintiff, if any, were proximately caused by the sole carelessness and negligence on the part of plaintiff, Albert Charles Darnell.

Wherefore, this answering defendant prays judgment as follows:

1. That the plaintiff take nothing by virtue of his action on file herein, and that his complaint be dismissed.

2. That the defendant have its costs of suit incurred herein, and

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3. For such other and further relief as the Court may deem just and proper in the premises.

JAMES M. CARTER,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant, United States of America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 15, 1949. [9]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS

(Or, in the Alternative, Requesting the Court to Dismiss of Its Own Motion)

To the Plaintiff, Albert Charles Darnell, and to His Attorney, Morris Lavine, and to the Defendants, United States of America and United States Coast & Geodetic Survey, and to Their Attorney, the United States Attorney for the Southern District of California:

You, and Each of You, Will Please Take Notice that on Monday, the 4th day of December, 1950, at the hour of 10:00 a.m., or as soon thereafter as the matter can be heard in Courtroom No. 5, located in the United States Post Office and Court House in the City of Los Angeles, State of California, before the Honorable Harry C. Westover, the defendant,

Mead Gilman, Jr., will move the court for an order dismissing the above-entitled action as to the defendant Mead Gilman, Jr.

Said motion will be made upon the following grounds: [11]

(1) That the court lacks jurisdiction over the subject matter.

(2) That there is a failure to state a claim upon which relief can be granted.

(3) That there is a misjoinder of parties defendant.

Said motion will be based upon the fact that plaintiff in this action seeks to join the United States of America as a defendant with an individual, one of its employees, the defendant, Mead Gilman, Jr., and the jurisdiction to hear such cause does not lie with the above-entitled court; on the further basis that there is a misjoinder of parties defendant in this: that an action against the United States cannot be joined with an action against its employees for civil damages under the Federal Tort Claims Act.

Dated this 14th day of November, 1950.

PARKER, STANBURY,
REESE & McGEE,

By /s/ HARRY W. PARKER,
Attorneys for Defendant,
Mead Gilman, Jr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 16, 1950. [12]

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United States District Court, Southern District of California, Central Division

No. 9703-HW

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER OF DISMISSAL

On Monday, the 4th day of December, 1950, at the hour of 10:00 a.m., upon the representation of Reuben Rosensweig, Esq., Assistant United States Attorney of the Southern District of California, that the United States Coast & Geodetic Survey, a defendant herein, was an agency of the United States of America, a defendant herein and an unnecessary party defendant, and upon the further representation that no opposition would be offered by Morris Lavine, attorney for plaintiff herein, it is now, upon the court's own motion,

Ordered, Adjudged and Decreed that the above-entitled action be dismissed as to the defendant United States Coast & Geodetic Survey.

Dated December 8th, 1950.

/s/ HARRY C. WESTOVER,
Judge. [16]

Approved as to form:

/s/ MORRIS LAVINE,
Attorney for Plaintiff,
Albert Charles Darnell.

Approved as to form:

/s/ REUBEN ROSENSWEIG,
Attorney for Defendants, United States of America and United States Coast & Geodetic Survey.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 8, 1950.

Entered December 13, 1950. [17]

United States District Court, Southern District of California, Central Division

No. 9703-HW

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al.,

Defendants.

ORDER OF DISMISSAL

The motion on behalf of the defendant Mead Gilman, Jr. came on regularly to be heard before the Honorable Harry C. Westover, Judge of the above-entitled court, Court Room number 5 thereof, lo-

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cated in the United States Post Office and Court House Building, City of Los Angeles on the 4th day of December, 1950. Moving party, Mead Gilman, Jr., a defendant herein was represented by his counsel, Parker, Stanbury, Reese & McGee, John Henry Peckham, Esquire of counsel. Defendant United States of America and United States Coast & Geodetic Survey were represented by their counsel Ernest A. Tolin, United States Attorney, Reuben Rosensweig, Esquire of counsel. Plaintiff was not present and his counsel, Morris Lavine, Esquire, was absent, but announced his acquiescence through counsel for the United States of America Mr. Reuben Rosensweig, in the hearing of the matter at the said time and place and motion vacated, Mr. Rosensweig having announced in open court that upon instructions from the office of the Attorney General of the United States that the United States of America would not oppose the motion and that plaintiff's counsel, Morris Lavine, would not oppose the motion and the court having considered the motion and the law involved and the court being fully advised in the premises

It Is Now Ordered, Adjudged and Decreed that the motion of Mead Gilman, Jr. for dismissals of the above-entitled action as to the said defendant Mead Gilman Jr. be and it is hereby granted.

Dated December 8th, 1950.

/s/ HARRY C. WESTOVER,
Judge of the United States District Court, Southern District of California, Central Division.

Approved as to form.

/s/ MORRIS LAVINE,
Attorney for plaintiff,
Albert Charles Darnell.

Approved as to form.

/s/ REUBEN ROSENSWEIG,
Attorney for defendants United States of America and United States Coast & Geodetic Survey.

Affidavit of Service by mail attached.

[Endorsed]: Filed December 8, 1950.

Entered December 12, 1950.

[Title of District Court and Cause.]

NOTICE OF MOTION TO BRING IN THIRD PARTY

To the Above-Named Plaintiff, Albert Charles Darnell, and to Morris Lavine, His Attorney:

You, and Each of You, Will Please Take Notice that on the 2nd day of January, 1951, at the hour of 10:00 a.m. or as soon thereafter as counsel can be heard, the defendant, United States of America, will move the above-entitled Court at the Post Office and Court House Building, Los Angeles, California, for leave, as a Third-Party Plaintiff, to serve a summons and complaint upon Mead Gilman, Jr., who is not a party to the action, but who is or may be liable to the defendant, United States of

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America, for all or part of plaintiff's claim against the defendant, United States of America. Said motion will be based upon the grounds more fully set forth in defendant's Motion to [22] bring in Third Party.

This motion will be based upon all of the documents, papers and records of the within action and under Rule 14 (a) of the Federal Rules of Civil Procedure.

Dated December 18, 1950.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

[Endorsed]: Filed December 18, 1950. [23]

[Title of District Court and Cause.]

MOTION TO BRING IN THIRD PARTY

Comes Now the defendant, United States of America, by and through its counsel, Ernest A. Tolin, United States Attorney for the Southern District of California, and Clyde C. Downing and Reuben Rosensweig, Assistants United States Attor-

ney for the Southern District of California, and moves the above-entitled Court for leave to make Mead Gilman, Jr., a party to this action, and that should said motion be granted, there be served upon said Mead Gilman, Jr., a copy of each of the following documents:

1. Complaint for personal injuries and damages;
2. Third-Party Summons;
3. Third-Party Complaint;

copies of which documents are also attached hereto and marked, respectively, Exhibits "A," "B" and "C." [24]

* * *

Dated this 18th day of December, 1950.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

[Endorsed]: Filed December 18, 1950. [26]

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At a stated term, to wit: the September term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday, the 2nd day of January, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Harry C. Westover,
District Judge.

[Title of Cause.]

ORDER GRANTING MOTION TO BRING IN THIRD PARTY

For hearing motion of defendant, U.S.A., filed Dec. 18, 1950, to bring in Mead Gilman, Jr., as third-party defendant; Reuben Rosensweig, Asst. U.S. Atty., appearing as counsel for movant, states there is no opposition to said motion, and the Court orders said motion granted. [27]

In the United States District Court in and for the Southern District of California, Central Division

No. 9703-HW

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant and Third-Party Plaintiff,

vs.

MEAD GILMAN, JR.,

Third-Party Defendant.

THIRD-PARTY COMPLAINT

Comes Now the defendant and Third-Party plaintiff, United States of America, and alleges as follows:

I.

The plaintiff, Albert Charles Darnell, has filed against the defendant, United States of America, a complaint for damages for personal injuries under the Federal Tort Claims Act, a copy of which complaint is hereto attached and marked Exhibit "A."

II.

That at the time of the happening of the accident in which plaintiff, Albert Charles Darnell, was injured, the third-party defendant, Mead Gilman, Jr., was an agent, servant and employee of the de-

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fendant, United States of America, and was at said time acting within the scope and duty of his employment as an [28] employee of the Coast and Geodetic Survey of the Department of Commerce of the United States.

III.

That as a direct and proximate result of the alleged negligence of said Third-party defendant, defendant, United States of America, may become liable to plaintiff, Albert Charles Darnell, for damages for the alleged injuries sustained by plaintiff.

IV.

That if and in the event, plaintiff, Albert Charles Darnell, recovers damages from the defendant, United States of America, as a result of the alleged negligence of said Third-party defendant, then the United States of America is entitled to recover from said Third-party defendant all of those sums which defendant, United States of America, may be compelled to pay plaintiff, Albert Charles Darnell.

Wherefore, defendant, United States of America, demands judgment against the Third-party defendant, Mead Gilman, Jr., for all sums that may be adjudged against the defendant, United States of America, in favor of plaintiff, Albert Charles Darnell, for its costs of action incurred herein, and for such other and further relief as the Court may deem just and proper in the premises.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

[Endorsed]: Filed January 2, 1951. [29]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS
(Or, in the Alternative, Requesting the Court to Dismiss of Its Own Motion)

To the Defendant and Third-Party Plaintiff, the United States of America, and to Its Attorney, United States Attorney for the Southern District of California:

You, and Each of You, Will Please Take Notice that on the 26th day of March, 1951, at the hour of 10 a.m., or as soon thereafter as the matter can be heard, in Courtroom No. 5 of the above-entitled Court, located in the United States Post Office and Court House in the City of Los Angeles, State of California, before the Hon. Harry C. Westover, the Third-party defendant, Mead Gilman, Jr., will move the Court for an order dismissing the above-entitled action as to the Third-party defendant, Mead Gilman, Jr. [34]

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Said motion will be made upon the following grounds:

1. That the Court lacks jurisdiction over the subject matter.

2. That there is a failure to state a claim upon which relief can be granted.

Said motion will be based upon the fact that plaintiff in this action sues the United States of America as a defendant and that defendant seeks to join as a third-party defendant one of its employees, defendant Mead Gilman, Jr., and the jurisdiction to hear such cause does not lie with the above-entitled Court; on the further ground that no action lies under the Federal Tort Claims Act against an employee of the Government in the circumstances herein involved; on the further ground that under the Federal Tort Claims Act the Government assumes liability for its employees; and on the further ground that to join the third-party defendant, Mead Gilman, Jr., herein would deprive him of the right to trial by jury.

Dated this 5th day of March, 1951.

PARKER, STANBURY,
REESE & McGEE,

By /s/ J. H. PECKHAM,
Attorneys for Defendant,
Mead Gilman, Jr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 5, 1951. [35]

[Title of District Court and Cause.]

ANSWER OF MEAD GILMAN, JR., TO THIRD-PARTY COMPLAINT

Comes Now the third-party defendant, Mead Gilman, Jr., and in answer to the third-party complaint on file herein admits, denies and alleges as follows:

I.

Denies generally and specifically each and every allegation contained in Paragraphs III and IV of said third-party complaint.

Wherefore, this third-party defendant prays that defendant and third-party plaintiff take nothing herein and that this third-party defendant be awarded judgment for his costs of suit herein incurred.

PARKER, STANBURY,
REESE & McGEE,

By /s/ HARRY W. PARKER,
Attorneys for Third-Party Defendant, Mead Gilman, Jr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 4, 1951. [39]

[Title of District Court and Cause.]

ORDER DENYING THIRD-PARTY DEFENDANT'S MOTION TO DISMISS

The Motion on behalf of Third-party defendant, Mead Gilman, Jr., came on regularly for hearing on March 26, 1951, in the above-entitled Court, on Third-party defendant's Motion to Dismiss, before the Honorable Harry C. Westover, the Third-party defendant being represented by Parker, Stanbury, Reese & McGee, by John Henry Peckham, Esq., of counsel; the defendant and Third-party plaintiff, United States of America, being represented by its counsel, Ernest A. Tolin, United States Attorney for the Southern District of California, and Clyde C. Downing and Reuben Rosensweig, Assistants United States Attorney for the Southern District of California, of counsel, and the Court having heard oral arguments of counsel, and having had submitted to it Points and Authorities by each counsel, and being fully satisfied in the premises,

It Is Hereby Ordered, Adjudged and Decreed that Third-party [41] defendant's Motion to Dismiss is hereby denied.

Dated April 11th, 1951.

/s/ HARRY C. WESTOVER,
Judge, United States District Court.

Approved as to form:

/s/ MORIS LAVINE,
Attorney for Plaintiff.

PARKER, STANBURY,
REESE & McGEE,

By /s/ J. H. PECKHAM,
Attorneys for Third-Party
Defendant.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assist U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

[Endorsed]: Filed April 12, 1951. [42]

[Title of District Court and Cause.]

OPINION

Plaintiff Albert Charles Darnell filed this action against United States of America, United States Coast & Geodetic Survey, and Mead Gilman, Jr., under the Federal Tort Claims Act.

Upon representation of the United States Attorney for the Southern District of California that

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United States Coast & Geodetic Survey, one of the named defendants, is an agency of the United States of America, the action against United States Coast & Geodetic Survey was dismissed.

Mead Gilman, Jr., also moved that the complaint be [43] dismissed as to him, which motion was granted. Defendant United States of America then filed a motion to make Mead Gilman, Jr., a third-party defendant. The motion was opposed by Mead Gilman, Jr., but after consideration by the Court, was granted, and Mead Gilman, Jr., was then made third-party defendant. Subsequently he appeared and moved the Court to dismiss the action against him as third-party defendant. The motion was denied, and Mead Gilman, Jr., as third-party defendant, filed his answer to the Third-Party Complaint.

The matter came on regularly for trial, United States of America appearing as defendant and as third-party plaintiff, and Mead Gilman, Jr., appearing as third-party defendant. After a hearing before the Court, judgment was rendered in favor of plaintiff, Albert Charles Darnell, and against defendant, United States of America, in the sum of $5,500.00. The cause of action of the United States of America as third-party plaintiff against Mead Gilman, Jr., third-party defendant, was submitted to the Court for decision.

Evidence in this case disclosed that Mead Gilman, Jr., was a civilian employee of United States Coast & Geodetic Survey, and that in the course of his employment he drove and operated a "jeep" (owned by the United States Coast & Geodetic Survey) in

such a careless, negligent and reckless manner that it collided with and damaged an automobile driven and operated by plaintiff, Albert Charles Darnell, inflicting personal injuries upon said plaintiff.

The question now before the Court is the right of the Government to maintain an action against a negligent employee who causes injury to a third party. [44]

The rule in California is stated as follows:

"An employer against whom a judgment has been rendered for damages occasioned by the unauthorized negligent act of an employee may recoup his losses in an action against the negligent employee."

Meyers v. Tranquility Irrigation District,
26 Cal. App. (2d) 385;

Johnston v. City of San Fernando,
35 Cal. App. (2d) 244.

The fact that the employer in the case at bar is the United States Government and the employee a civilian employee does not in any way affect the general rule. There seems to be no doubt in California that where a servant is solely responsible for injury because of an unauthorized negligent act the employer, who is forced to respond in damages because of the negligence of the servant, may maintain an action against the servant for the amount of damages sustained. The government in this case had the right to make the servant a third-party defendant, so that the matter in controversy could be determined in one action rather than in two.

The Supreme Court in its latest decision, United

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States of America v. Yellow Cab Co. and Capitol Transit Co. v. U.S.A., 218 and 204, October Term, 1940, says, in speaking of actions under the Tort Claims Act:

> "Of course there is no immunity from suit by the government to collect claims for contribution due it from its joint tort feasors. The government should be able to enforce this right in a Federal court not only in a separate [45] action but by impleading the joint tort feasor as a third-party defendant."

Under the facts of this case and the law as established both by the State and Federal courts, judgment must be rendered in favor of third-party plaintiff, United States of America, and against the third-party defendant, Mead Gilman, Jr. The government is entitled to a judgment against Mead Gilman, Jr., in the sum of five thousand five hundred ($5,500.00) dollars.

It is so ordered.

Dated November 14, 1951.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed November 14, 1951. [46]

[Title of District Court and Cause.]

OBJECTIONS TO CONCLUSIONS OF LAW AND JUDGMENT

Comes Now the third-party defendant, Mead Gilman, Jr., by his attorneys, Parker, Stanbury, Reese & McGee, by Wm. C. Wetherbee of counsel, and objects to the Conclusions of Law served and filed by counsel for the plaintiff and to the Judgment prepared therein on the following grounds:

I.

Although third-party defendant, Mead Gilman, Jr., could become liable to the third-party plaintiff, United States of America, only upon a conclusion of law that said United States of America was entitled to recover from its employee for damage resulting to it from the negligent act of its employee under the Federal Tort Claims Act, [47] no such conclusion of law is contained within the Conclusions of Law served and filed upon this third-party defendant.

II.

The Judgment is erroneous in form and substance in that it is not in accordance with the issues submitted by the pleadings or the Court's Opinion filed in the above-entitled matter.

The Judgment in its present form purports to grant plaintiff a judgment against the defendant United States of America and the third-party defendant, Mead Gilman, Jr. It should clearly show that judgment in favor of said plaintiff was granted

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against the defendant United States of America in the sum of $5,500.00 and should show judgment in favor of the third-party plaintiff, United States of America, against the third-party defendant, Mead Gilman, Jr., in the sum of $5,500.00.

In addition no provision or opportunity was given to third-party defendant and his attorneys to approve or disapprove the Judgment as to form as required by Rule 7 of the Local Rules of this District Court.

Wherefore, it is submitted that said Judgment erroneously is a joint judgment against the United States of America, defendant, and Mead Gilman, Jr., third-party defendant, which is improper and confuses the record for purposes of appeal.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WM. C. WETHERBEE,
Attorneys for Third-Party
Defendant, Mead Gilman, Jr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 27, 1951. [48]

[Title of District Court and Cause.]

OBJECTIONS TO CONCLUSIONS OF LAW AND JUDGMENT

Comes Now the defendant and third-party plaintiff, United States of America, by and through its

counsel of record, and objects to the Conclusions of Law served and filed by counsel for plaintiff, Albert Charles Darnell, and to the Judgment prepared therein on the following grounds:

I.

Although third-party defendant, Mead Gilman, Jr., could become liable to the defendant and third-party plaintiff, United States of America, only upon a conclusion of law that said United States of America was entitled to recover from its employee for damages resulting to it from the negligent act of its employee under the Federal Tort Claims Act, no such conclusion of law is contained within the Conclusions of Law served and filed upon this defendant and third-party plaintiff.

II.

The defendant and third-party plaintiff, United States of America, submits that the Judgment is erroneous in that it is not in accord [50] with the issues submitted by the pleadings of the Court's Opinion heretofore filed in this case.

The Judgment in its present form purports to grant plaintiff, Albert Charles Darnell, a judgment against the defendant and third-party plaintiff, United States of America, and the third-party defendant, Mead Gilman, Jr. The defendant and third-party plaintiff, United States of America, believes that the Judgment should clearly show that judgment in favor of said plaintiff was granted against the defendant and third-party plaintiff,

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United States of America, in the sum of $5,500, and should further show that judgment in favor of the defendant and third-party plaintiff, United States of America, against the third-party defendant, Mead Gilman, Jr., in the sum of $5,500.00.

Wherefore, it is submitted that said Judgment erroneously is a joint judgment against the United States of America and Mead Gilman, Jr., which we believe is improper.

Dated November 29, 1951.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWIEG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 30, 1951. [51]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing on October 9, 1951, before the Honorable Harry C. Westover, Judge of the U. S. District Court in and for the Southern District of California, Central Division, the plaintiff, Albert Charles Darnell, appearing by his attorney, Morris Lavine; the defendant and third-party plaintiff, United States of America, appearing by Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Reuben Rosensweig, Assistants U. S. Attorney, and third-party defendant, Mead Gilman, Jr., appearing by William C. Wetherbee of Parker, Stanbury, Reese & McGee, and plaintiff having produced evidence, and the plaintiff, Albert Charles Darnell, and the defendant and third-party plaintiff, United States of America, having stipulated to certain facts, and an exhibit having been introduced, and the Court having heard testimony, both oral and documentary, and certain stipulations of fact having been [53] entered into, the Court finds as follows:

I.

That on October 30, 1948, at about the hour of 10 a.m., plaintiff, Albert Charles Darnell, was driving an automobile in the township of Blythe, State of California.

II.

That the plaintiff stopped his car and was at a complete stop when he was struck in the rear by a

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vehicle belonging to defendant, United States of America, and operated by Mead Gilman, Jr., an employee of the defendant, United States of America, and operated by Mead Gilman, Jr., an employee of the defendant, United States of America, within the scope and duty of his employment for the defendant, United States of America.

III.

That third-party defendant, Mead Gilman, Jr., drove said vehicle carelessly, recklessly and negligently, and that as a direct and proximate result of said negligence, recklessness and carelessness, plaintiff Albert Charles Darnell suffered physical injuries therefrom.

IV.

That said physical injuries suffered by plaintiff, Albert Charles Darnell, were of such a character as to require an operation upon his person and to require hospitalization and surgical and medical care and attention, and that as a direct and proximate result of said negligence of third-party defendant, Mead Gilman, Jr., plaintiff was generally and specially damaged in the sum of $5,500.

V.

That at the time of the happening of the accident in which plaintiff Albert Charles Darnell was injured, third-party defendant, Mead Gilman, Jr., was an agent, servant and employee of defendant and third-party plaintiff, United States of America, and was at said time and place acting within the scope and duty of his employment as an employee of the

Coast and Geodetic Survey of the Department of Commerce of the United States. [54]

VI.

That as a direct and proximate result of the negligence, recklessness and carelessness of said third-party defendant, Mead Gilman, Jr., the United States of America, became liable to plaintiff, Albert Charles Darnell, for damages in the sum of $5,500 for injuries suffered by plaintiff, Albert Charles Darnell.

VII.

That as a direct and proximate result of the negligence, recklessness and carelessness of said third-party defendant, Mead Gilman, Jr., the defendant and third-party plaintiff, United States of America, is entitled to recover from said Mead Gilman, Jr., the sum of $5,500, which defendant and third-party plaintiff, United States of America, will be compelled to pay to plaintiff, Albert Charles Darnell, for the injuries which he suffered.

Conclusions of Law

From the foregoing facts, the Court makes the following conclusions of law:

I.

That the plaintiff, Albert Charles Darnell, is entitled to judgment against the defendant and third-party plaintiff, United States of America, in the sum of $5,500.

II.

That defendant and third-party plaintiff, United

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States of America, having had judgment rendered against it in the sum of $5,500 as a direct and proximate result of the negligence, carelessness and recklessness of its employee, third-party defendant, Mead Gilman, Jr., the defendant and third-party plaintiff, United States of America, is entitled to judgment against the said third-party defendant, Mead Gilman, Jr., in the sum of $5,500.00.

Dated Jan. 15, 1952.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Approved as to form:

/s/ REUBEN ROSENSWEIG,

/s/ MORRIS LAVINE,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 15, 1952. [55]

In the United States District Court in and for the Southern District of California, Central Division

No. 9703-HW

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant and Third-Party Plaintiff.

JUDGMENT

This cause having come on regularly for trial before the Hon. Harry C. Westover, Judge of the U. S. District Court in and for the Southern District of California, Central Division, and the plaintiff having appeared in person by his counsel, Morris Lavine, and defendant and third-party plaintiff, United States of America, having appeared by Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Reuben Rosensweig, Assistants U. S. Attorney, and third-party defendant, Mead Gilman, Jr., having appeared in person with his counsel, William C. Wetherbee of the firm of Parker, Stanbury, Reese & McGee, and the Court having taken testimony, both oral and documentary, and certain Stipulations of Fact having been entered into, and the Court having heard all of the arguments of counsel,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff, Albert Charles Darnell, be and is

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awarded the sum of $5,500 against defendant and third-party plaintiff, United States of America.

Dated January 15th, 1952.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Approved as to form:

/s/ REUBEN ROSENSWEIG.

/s/ MORRIS LAVINE,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 15, 1952.

Entered and Docketed January 15, 1952. [57]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for hearing on October 9, 1951, before the Honorable Harry C. Westover, Judge of the U. S. District Court in and for the Southern District of California, Central Division, the plaintiff, Albert Charles Darnell, appearing by his attorney, Morris Lavine; the defendant and third-party plaintiff, United States of America, appearing by Ernest A. Tolin, United States Attorney, and Clyde C. Downing and Reuben

Rosensweig, Assistants U. S. Attorney, and the third-party defendant, Mead Gilman, Jr., appearing by William C. Wetherbee of Parker, Stanbury, Reese & McGee, and plaintiff having produced evidence, and the plaintiff, Albert Charles Darnell, and the defendant, United States of America, having stipulated to certain facts, and an exhibit having been introduced, and the Court having heard testimony, both oral and documentary, and certain Stipulations of Fact having been entered into, [59] the Court finds as follows:

I.

That on October 30, 1948, at about the hour of 10:00 a.m., the plaintiff, Albert Charles Darnell, was driving an automobile in the township of Blythe, State of California.

II.

That the plaintiff stopped his car and was at a complete stop when he was struck in the rear by a vehicle belonging to the defendant, United States of America, and operated by Mead Gilman, Jr., an employee of the defendant, United States of America, within the scope and duty of his employment, for the defendant, United States of America.

III.

That third-party defendant, Mead Gilman, Jr., drove said vehicle carelessly, recklessly and negligently, and that as a direct and proximate result of said negligence, recklessness and carelessness,

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plaintiff, Albert Charles Darnell, suffered physical injuries therefrom.

IV.

That said physical injuries suffered by plaintiff, Albert Charles Darnell, were of such a character as to require an operation upon his person and to require hospitalization and surgical and medical care and attention, and that as a direct and proximate result of said negligence of third-party defendant, Mead Gilman, Jr., plaintiff was generally and specially damaged in the sum of $5,500.00

V.

That at the time of the happening of the accident in which plaintiff, Albert Charles Darnell, was injured, third-party defendant, Mead Gilman, Jr., was an agent, servant and employee of defendant and third-party plaintiff, United States of America, and was at said time and place acting within the scope and duty of his employment as an employee of the Coast and Geodetic Survey of the Department of Commerce of the United States.

VI.

That as a direct and proximate result of the negligence, [60] recklessness and carelessness of said third-party defendant, Mead Gilman, Jr., defendant and third-party plaintiff, United States of America, became liable to plaintiff, Albert Charles Darnell, for damages in the sum of $5,500, for the injuries suffered by plaintiff, Albert Charles Darnell.

VII.

That as a direct and proximate result of the

negligence, recklessness, and carelessness of said third-party defendant, Mead Gilman, Jr., the defendant and third-party plaintiff, United States of America, is entitled to recover from said Mead Gilman, Jr., the sum of $5,500, which defendant and third-party plaintiff, United States of America, will be compelled to pay to plaintiff, Albert Charles Darnell, for the injuries which he suffered.

Conclusions of Law

From the foregoing facts, the Court makes the following Conclusions of Law:

I.

That defendant and third-party plaintiff, United States of America, having had judgment rendered against it in the sum of $5,500 as a direct and proximate result of the negligence, carelessness and recklessness of third-party defendant, Mead Gilman, Jr., the defendant and third-party plaintiff, United States of America, is entitled to judgment against the said Mead Gilman, Jr., in the sum of $5,500.

Dated Jan. 15, 1952.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Approved as to form:

ERNEST A. TOLIN,
United States Attorney;

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CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff. [61]

Receipt of Copy acknowledged.

Lodged November 30, 1951.

[Endorsed]: Filed January 15, 1952. [62]

In the United States District Court in and for the Southern District of California, Central Division

No. 9703-HW

ALBERT CHARLES DARNELL,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant and Third-Party Plaintiff,

vs.

MEAD GILMAN, JR.,
Third-Party Defendant.

JUDGMENT

This cause having come on regularly for trial before the Honorable Harry C. Westover, Judge of the United States District Court, in and for the

Southern District of California, Central Division, and the plaintiff having appeared in person and by his counsel, Morris Lavine, and defendant and third-party plaintiff, United States of America, having appeared by Ernest A. Tolin, United States Attorney; Clyde C. Downing and Reuben Rosenseiwg, Assistants U. S. Attorney, and the third party defendant, Mead Gilman, Jr., having appeared in person and with his counsel, William C. Wetherbee of the firm of Parker, Stanbury, Reese & McGee, and the Court having taken testimony, both oral and documentary, and certain Stipulations of Fact having been entered into, and the Court having heard all the arguments of counsel,

It Is Hereby Ordered, Adjudged and Decreed that defendant and [64] third-party plaintiff, United States of America, be and is awarded the sum of $5,500.00 against third-party defendant, Mead Gilman, Jr.

Dated Jan. 15th, 1952.

/s/ HARRY C. WESTOVER,
Judge of the United States
District Court.

Approved as to form:

ERNEST A. TOLIN,
United States Attorney;

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CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

Receipt of Copy acknowledged.

Lodged November 30, 1951.

[Endorsed]: Filed January 15, 1952.

Entered and Docketed January 15, 1952. [65]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73 (b)

Notice Is Hereby Given that third-party defendant, Mead Gilman, Jr., above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order denying his motion for dismissal as third-party defendant and from the final judgment entered in this action on January 15, 1952, in favor of defendant and third-party plaintiff, United States of America.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WM. C. WETHERBEE,
Attorneys for Appellant, Mead Gilman, Jr., Third-Party Defendant.

[Endorsed]: Filed February 15, 1952. [67]

[Title of District Court and Cause.]

WAIVER OF FILING OF BOND AND ORDER

Comes Now the defendant and third-party plaintiff in the above-entitled matter, United States of America, and waives the filing of any bond by third-party defendant, Mead Gilman, Jr., as a condition to his appeal, and stipulates that without the necessity of a supersedeas bond stay of execution on the judgment entered may be ordered until such time as the appeal is determined.

Dated February 20, 1952.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division; [71]

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney, Attorneys for Defendant and Third-Party Plaintiff.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WM. C. WETHERBEE,
Attorneys for Third-Party
Defendant.

It is so Ordered this 3rd day of March, 1952.

/s/ HARRY C. WESTOVER,
Judge.

[Endorsed]: Filed March 3, 1952. [72]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 72, inclusive, contain the original Complaint for Personal Injuries and Damages; Answer; Notice of Motion to Dismiss, etc.; Order of Dismissal as to United States Coast & Geodetic Survey; Order of Dismissal as to Mead Gilman, Jr.; Notice of Motion to Bring in Third Party; Motion to Bring in Third Party; Third Party Complaint; Notice of Motion to Dismiss; Answer of Mead Gilman, Jr., to Third Party Complaint; Order Denying Third-Party Defendant's Motion to Dismiss; Opinion; Objections to Conclusions of Law and Judgment of Mead Gilman, Jr.; Objections to Conclusions of Law and Judgment of United States of America; Findings of Fact and Conclusions of Law and Judgment Favor of Plaintiff; Findings of Fact and Conclusions of Law and Judgment Favor of Third-Party Plaintiff; Notice of Appeal; Designation of Record on Appeal and Waiver of Bond, etc., and a full, true and correct copy of minute order entered January 2, 1951, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 18th day of March, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13,305. United States Court of Appeals for the Ninth Circuit. Mead Gilman, Jr., Appellant, vs. United States of America and Albert Charles Darnell, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 19, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

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United States Court of Appeals,
Ninth Circuit

No. 13305

ALBERT CHARLES DARNELL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant and Third-party Plaintiff,

vs.

MEAD GILMAN, JR.,

Third-party Defendant.

DESIGNATION OF CONTENTS OF RECORD AND STATEMENT OF POINTS ON APPEAL

To the Clerk of the Above-Entitled Court, to the Defendant and Third-Party Plaintiff, United States of America, and to Its Attorneys:

You, and Each of You, Will Please Take Notice that the third-party defendant, Mead Gilman, Jr., hereby makes his designation of the portions of the record, proceedings and evidence to be contained in the record on appeal:

1. All of the pleadings.
2. All of the motions and notices of motions to dismiss and the orders made thereon.
3. All of the findings of fact and conclusions of law, together with the direction for the entry of judgment thereon.

4. The opinions of the Court.
5. The judgments.
6. The notice of appeal, together with date of filing.
7. The judgment roll.
8. Clerk's certificate.

No evidentiary material need be included in the record since appellant relies upon the following points on appeal:

1. Failure to state a claim upon which relief can be granted.

2. Lack of jurisdiction over the subject matter.

PARKER, STANBURY,
REESE & McGEE,

By /s/ WM. C. WETHERBEE,
Attorneys for Third-Party Defendant, Mead Gilman, Jr.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 24, 1952.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 11305

MEAD GILMAN, JR., APPELLANT

vs.

UNITED STATES OF AMERICA AND ALBERT CHARLES DARNELL, APPELLEES

Appeal from the United States District Court for the Southern District of California, Central Division

PROCEEDINGS HAD IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Friday, May 8, 1953

Before: POPE, *Circuit Judge,* MCCORMICK and HARRISON, *District Judges*

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Wm. C. Waterbee, counsel for appellant and Mr. T. S. L. Perlman, Attorney, Department of Justice, counsel for appellee, United States of America, and submitted to the court for consideration and decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Monday, August 1, 1953

Before: POPE, *Circuit Judge,* MCCORMICK and HARRISON, *District Judges*

ORDER DIRECTING FILING OF OPINIONS AND FILING AND RECORDING OF JUDGMENT

Ordered that the typewritten opinion and dissenting opinion of Harrison, D. J., this day rendered by this Court in the above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the majority opinion rendered.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13,305

August 3, 1953

MEAD GILMAN, JR., APPELLANT

vs.

UNITED STATES OF AMERICA AND ALBERT CHARLES DARNELL, APPELLEES

Appeal from the United States District Court, Southern District of California, Central Division

Before POPE, *Circuit Judge*, and MCCORMICK and HARRISON, *District Judges*

POPE, *Circuit Judge:*

The question presented by this appeal is whether the United States, after suffering judgment against it under the Federal Tort Claims Act (28 USCA 1346(b)) for injuries arising from the negligent operation of a government automobile, may recover, by way of indemnity, the amount of such judgment from its employee, the driver who was guilty of the negligence which caused the injuries.

Appellee Darnell brought the original action against the United States to recover damages for injuries arising when his automobile collided with a government car driven by the appellant who was an employee of the United States Coast and Geodetic Survey. The court granted the Government's motion under Rule 14(a) of the Rules of Civil Procedure for leave to implead the appellant as a third party defendant, and thereupon a third party complaint was filed asking that if the United States should be held liable it should have indemnity against appellant for the full amount of its liability. Appellant's motion to dismiss the third party complaint was denied and upon trial the district court found that the plaintiff's injuries were caused solely by the negligence of the appellant acting within the scope of his employment. Accordingly, the court gave judgment against the United States for $5500. Upon the same day it gave judgment against the appellant and in favor of the United States in the same amount of $5500. From the latter judgment this appeal is taken.

Although the judgment in favor of the Government and against the appellant was entered in an action brought under the Tort Claims Act, the cause of action which the Government asserted was not based upon any provision of that Act. It was asserted under

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the common law rule that under circumstances similar to those here present, a private employer may recover from his negligent employee the amount the employer has been required to pay under a judgment in favor of a third person arising from damage caused by the employee's negligent act, where judgment ran against the employer solely by reason of the doctrine of *respondeat superior*. The trial court pointed out that this rule is well established in California where the accident occurred, citing *Myers* v. *Tranquility Irrigation District*, 26 C.A. 2d 385, 79 P. 2d 419, and *Johnston* v. *City of San Fernando*, 35 C.A. 2d 244, 95 P. 2d 147, and held that the Government should have the same right under the same rule.

The rule is one generally recognized and enforced by both state and federal courts. See Prosser on Torts, p. 1114, Restatement of the Law of Agency, §401, comment c; *Washington Gas Co.* v. *District of Columbia*, 161 U.S. 316. The appellant contends, however, that §2676 of Title 28, which was enacted as a part of the Federal Tort Claims Act, discloses that it was the intention of Congress to give the Government employee certain benefits under the Act, and that the intention so expressed in this section is inconsistent with any possible holding that the employee might be made liable for indemnity to the United States. That section provides: "The judgment in an action under Section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

The Government in reply to this contention points out that the language of the section quoted is to the effect that the judgment is to be a bar to any action *by the claimant;* that this has no bearing on anything except the rights of injured claimants, and has no impact upon the Government's rights against its employees; therefore, there is no reason why the general rule should not be available to the United States, particularly in the absence of some express enactment to the contrary. In this connection it points to the statement in *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 551: "Of course there is no immunity from suit *by* the Government to collect claims for contribution due it from its joint tort-feasors. The Government should be able to enforce this right in a federal court not only in a separate action but by impleading the joint tort-feasors as a third-party defendant."

We think that the answer to these several contentions of the parties is to be found through an examination of the basis for the rule stated above which permits the employer to recover indemnity from the negligent employee. That basis is, we think, correctly stated in the Government's brief: "The action for indemnity is quasi-contractual in theory, its rationale being that the defendant is unjustly enriched by the plaintiff's payment of the injured party's

claim." Compare Restatement of the Law of Restitution, under the topic "Discharge by one person of duty also owed by another", (p. 330): "Where the payor has given something in the discharge of a duty to which the other is subject, his right to indemnity or contribution therefor is based upon the fact that he has thereby conferred a benefit upon the other."

Since the actual wrongdoer in such cases is the employee, the employer, who has been vicariously liable and who in consequence has been required to pay damages to the third person, in so doing has paid moneys which in equity and good conscience the person actually guilty of negligence ought to pay. Thus the employer has conferred a benefit upon the employee and this gives rise to an obligation which the law implies. The employer's action is one which in the words of Lord Mansfield, "lies only for money which *ex aequo et bono*, the defendant ought to refund. . . ." Moses v. Macferlan, 2 Burr. 1005, 1010. As stated by Woodward, The Law of Quasi-Contracts, §259, "In such cases, the obligation may well be rested upon quasi-contractual principles, for in so far as one tort-feasor pays what in equity and good conscience another tort-feasor ought to pay, the latter receives a benefit at the expense of the former, the retention of which is unjust." [1]

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[1] "Other types of the right to indemnity are commonly called quasi contractual, or arising out of a 'contract implied by law'. Indemnity between persons liable for a tort falls within this type of case. As between such persons, the obligation to indemnify is not a consensual one; it is based altogether upon the law's notion—influenced by an equitable background—of what is fair and proper between the parties. It is true that the relationship of the parties, which often affords the decisive clue as to what is fair between them, may have arisen by contract, though it need not have. But in these cases the contract does not create the right to indemnity. It only creates a part of the fact situation, and it is the fact situation in its entirety, consensual and non-consensual elements both included, which gives rise to the obligation to indemnify. The quasi-contractual idea of unjust enrichment of course underlies any holding that one who has been compelled in discharging his own legal obligation to pay off a claim which in fairness and good conscience should be paid by another can secure reimbursement from the other. But in tort indemnity cases, the leading facts are apt to be acts and relationships out of which tort liabilities have arisen, and it will often follow from this that the question of unjust enrichment involved in the granting of indemnity will have to be decided on substantially the same principles as those which controlled the creation of the original tort liability." (81 Pa. Law Rev. 130, p. 146-147; "Contribution and Indemnity Between Tort-feasors", Robert A. Leflar).

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When we inquire whether a rule dependent upon this rationale should apply in the instant case, we are at once confronted by the circumstance that the moment judgment was entered against the Government,[2] then by virtue of §2676, supra, the employee was no longer primarily answerable to the claimant,—he was not answerable at all. Therefore, when or if the Government paid the judgment against it, it was not paying a sum which the employee ought to have paid, for, as we have seen, any obligation on his part was completely wiped out.

It is therefore our conclusion that since any legal basis for a claim of indemnity is here lacking, the Government was not entitled to have judgment against the appellant. It is thus apparent that we do not deal with any question as to whether Section 2676 releases the Government's claim against its employee. Such is not the question here, but rather the inquiry is, whether, in the circumstances of this case any cause of action ever arose in favor of the Government and against its employee. Since the right of indemnity here asserted arises, in the case of employers generally, only by quasi-contract, through the payment of that which the employee himself, in equity and good conscience should have paid, it is manifest that here, where the employee owes no such duty the circumstances of the necessary unjust enrichment do not exist, and no cause of action ever arose in favor of the Government.

While the legislative history of the Tort Claims Act is in no sense controlling in an attempt to arrive at intended consequences of Section 2676, yet its indications are not at variance with the results here arrived at.[3]

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[2] It would be an interesting question, which we need not examine, whether an employer's right of indemnity arises when judgment is entered against him, or only when he has paid the judgment. Thus the form of the action, at common law, was denominated one for "money paid".

[3] Thus Senate Report 1196, 77th Cong. 2d Sess., p. 5, dealing with the corresponding provision of what is now Section 2672 of Title 28 to the effect that the administrative settlement of a claim of $1000 or less "shall constitute a complete release of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim" contained the following statement: "It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone within limits, leaving the employee at fault to be dealt with under the usual disciplinary controls." This report was made in 1942. While in footnote 8 to United States v. Yellow Cab Co., supra, some question is raised as to the force of the 1942 legislative history in construing a 1946 Act, yet Dalehite v. United States, — U. S. —,

We think it is clear from what was said in *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305, that the question of the duty owed by a Government employee to the Government is one to be determined by federal and not by state law. The cause of action which the Government here sought to enforce was not one under the Federal Tort Claims Act which adopts local law for the purpose of defining the Government's tort liability.[4] But regardless of whether state or federal law be here applied, § 2676 cuts the ground from under the Government's claim for indemnity.

It is to be noted that in using the language quoted supra from *United States* v. *Yellow Cab Co.*, the Supreme Court was not dealing with a situation involving any possible application of § 2676. The court was considering the question of contribution as between the United States and a stranger tort-feasor.

In view of what we have here said we find it unnecessary to consider appellant's further contention that the Government's claim

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(June 8, 1953), makes it plain that Congress, in passing the Act in 1946, relied upon the 1942 reports and testimony, and the Court there quotes extensively from them including the testimony of then Assistant Attorney General Shea. At that time Mr. Shea testified: "If the Government has satisfied a claim which is made on account of a collision between a truck carrying mail and a private car, that should, in our judgment, be the end of it. After the claimant has obtained satisfaction of his claim from the Government, either by a judgment or by an administrative award, he should not be able to turn around and sue the driver of the truck. . . . The Chairman. Mr. Shea, you are discussing and directing your remarks to the matter where, if a person is injured and files a claim against the Government and the Government satisfies that claim, that is the end of the claim against anybody? Mr. Shea. That is right. The Chairman. What is the arrangement when the Government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury in the event of gross negligence? Mr. Shea. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee. Mr. Laughlin. No right of subrogation is set up? Mr. Shea. Not against the employee." (Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2nd Sess., on H.R. 5373 and 6463, pp. 9, 10.)

[4] For this reason no problem is posed such as that indicated in the conflicting decisions cited in *United States* v. *Lushbough*, 8 cir., 200 F. 2d 717, at p. 720. It is noted that in that case the question involved here was not reached because it was held that the Government was not liable.

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should be denied for the same reasons which prompted judgment against it in *United States* v. *Standard Oil Co.*, 332 U. S. 301.

Accordingly, the judgment is reversed and the cause remanded with directions to enter judgment for appellant.

HARRISON, D. J., dissenting:

I am of the opinion that Rule 14, Federal Rules of Civil Procedure should apply in tort claims actions. The Federal Tort Claims Act waives the government's immunity from suit but nowhere does the government waive its right to sue.

The majority opinion concedes that under the common law and under the law of California, a private employer may recover from his negligent employee for losses sustained by the employer by reason of the negligent acts of the employee. *Bradley* v. *Rosenthal*, 97 P. 875; see also *Spruce* v. *Wellman*, 219 P. 2d 472.

If under *United States* v. *Yellow Cab Co.*, 340 U. S. 543, the government is liable for contribution under the law of the State of Pennsylvania, the same reasoning should apply in this case. Tort Claims Act liability is in all events secondary. The only difference as to the government's liability between the case at bar and the Yellow Cab case, supra, is that in the Yellow Cab case the government was a joint tort-feasor and as a result paid only its portion of the liability but in this case it must pay all and cannot, according to the majority seek recoupment from the one who is primarily liable.

It must be remembered that much of the litigation under the Tort Claims Act arises while the employee, in the course of his employment, is using a privately owned automobile fully covered by insurance. The ruling of the majority permits such insurance carriers to escape liability at the expense of the government. (See *U. S.* v. *Aetna Surety Co.*, 338 U. S. 366).

It is my view that to permit an employee of the government to escape liability for his tort is to place a premium on negligence and encourage collusion between the employee and the claimant. It also places the government employee in a different class from that of a private employee.

I believe that the Yellow Cab case supports my conclusions. It will be noted that the Supreme Court, on page 554 of 340 U. S., approves the language of Judge (later Justice) Cardozo in *Anderson* v. *Hayes Construction Co.*, 153 N.E. 28, 29, when it quotes him as follows:

> "* * * No sensible reason can be imagined why the State, having consented to be sued, should thus paralyze the remedy."

By a parity of reasoning no sensible reason can be imagined why the State should paralyze its own remedy.

See also Judge Cardozo's opinion in *Schubert* v. *August Schubert Wagon Co.*, 164 N. E. 42, in which he held that the employer's right of recoupment from his negligent employee is based on breach of an independent duty owed the employer by the employee, and not on subrogation or quasi-contract.

It should also be noted that the Supreme Court cites in the Yellow Cab case 3 Moore's Federal Practice (2d ed. 1948), page 507, with approval, and I quote from the same because I feel it correctly states my conclusions:

> "Par. 14.29. Impleader By and Against the United States. Where the United States is the defendant it should be able to implead a third party in a case within Rule 14, to wit, where the United States as third-party plaintiff asserts that the third-party defendant 'is or may be liable' to it for all or part of the plaintiff's claim against it. This follows from the fact that the Rules are generally applicable to actions by and against the United States, subject to jurisdictional limitations. And where the United States is the third-party plaintiff there is no problem of sovereign immunity from suit—the sovereign is the claimant. This principle should be true (1) whether the original plaintiff's claim against the United States is one under the Tucker Act, which claim for convenience may be described as *ex contractu*, or (2) whether the claim is one under the Federal Tort Claims Act, *ex delicto*."

It is difficult for me to reconcile that Rule 14 can be used against the government and employee but cannot be used by the government against the employee.

The Tort Claims Act itself militates against this result: [1]

> 28 U.S.C.A., § 1346(b)—"* * * * the district court shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*" (Emphasis supplied.)

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[1] *Elizabeth H. Dalehite et al.* v. *U. S.*, 1953, — U.S. —, 21 L.W. 4431.

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28 U.S.C.A., § 2674.—"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances • • •"

Paraphrasing Mr. Chief Justice Taft in *Ford* v. *United States*, 273 U. S. 593, at 611—if it was the intention of Congress to waive the government's common law rights, why should it not have been expressed?

To place the government as a target without the ability to defend itself leaves the government as a litigant, subject to the laws of the State of California without the right to rely upon the laws of California as a defensive measure.

(Endorsed:) Opinion and Dissenting Opinion. Filed Aug. 3, 1953. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13305

MEAD GILMAN, JR., APPELLANT,

vs.

UNITED STATES OF AMERICA AND ALBERT CHARLES DARNELL, APPELLEES

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed and that this cause be, and hereby is remanded to the said District Court, with directions to enter judgment for appellant.

(Endorsed:) Judgment. Filed and entered August 3, 1953. Paul P. O'Brien, Clerk.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 13305

MEAD GILMAN, JR., APPELLANT,

vs.

UNITED STATES OF AMERICA, ET AL., APPELLEES

CERTIFICATE OF CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing sixty-two (62) pages, numbered from and including 1 to and including 62, to be a full, true and correct copy of the entire record of the above-entitled case in the said Court of Appeals, made pursuant to request of Honorable Robert L. Stern, Acting Solicitor General of the United States, counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said The United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of September, 1953.

[SEAL.]

PAUL P. O'BRIEN,
Clerk.

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SUPREME COURT OF THE UNITED STATES

No. 449, October Term, 1953

United States of America, petitioner

vs.

Mead Gilman, Jr.

Order allowing certiorari. Filed December 14, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.